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Supreme Court, U.S.
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No. 02-1220

In The

Supreme Court of the United States

WALMAR INVESTMENT COMPANY,

Petitioner,

v.

CHARLES BRUNJES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Missouri Court of Appeals properly applied this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), when determining the propriety of three conditions placed on a land development.

PARTIES TO THE PROCEEDINGS BELOW

The petitioner in this proceeding is Walmar Investment Company. Respondents are Charles Brunjes, Ron Fowler, Henry Dussold, Bob Englehart, Donald Barr, Jr., Dan Brungard, Carolyn Thomas, Cheryl Hibbeler and Paul Renaud, in their official capacities as members of the City of O'Fallon's Planning and Zoning Commission. The remaining respondent is the City of O'Fallon, Missouri.

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OPINIONS AND ORDERS BELOW

The Judgment and Findings of Fact and Conclusions of Law of the Circuit Court of St. Charles County, Missouri are unreported. (App. 17-38). The Order of the Missouri Court of Appeals, Eastern District, is reported at 87 S.W.3d 349. The Missouri Court of Appeals' Memorandum Supplementing Order Affirming Judgment Pursuant to Rule 84.16(b) is unreported. (App. 1-14). The Order of the Missouri Court of Appeals, Eastern District, denying the Motion for Rehearing and/or for Transfer to the Missouri Supreme Court is unreported. (App. 39). The Missouri Supreme Court's denial of petitioner's Application for Transfer also is unreported. (App. 40).

JURISDICTIONAL STATEMENT

On May 18, 2001, the Circuit Court of St. Charles County, Missouri, denied a petition for writ of mandamus filed by Walmar Investment Company ("Walmar"), seeking to compel the Planning and Zoning Commission ("P&Z Commission") of the City of O'Fallon, Missouri, to approve a site development plan despite Walmar's failure to comply with three approval conditions. (App. 38). Walmar sought appellate review of the denial, and the Missouri Court of Appeals, Eastern District, issued its Order affirming the denial of a writ of mandamus on August 20, 2002. (App. 1-14). The Missouri Court of Appeals, Eastern District, denied petitioner's Motion for Rehearing and/or for Transfer to the Missouri Supreme Court on October 8, 2002. (App. 15). The Missouri Supreme Court denied petitioner's Application for Transfer on November 26, 2002. (App. 15). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

Invocation of this Court's jurisdiction is improper because the Missouri Court of Appeals did not possess subject matter jurisdiction over the instant case. Missouri courts lacks subject matter jurisdiction to decide a petition for writ of mandamus where an adequate alternative remedy is available. *State ex rel. Kelley v. Mitchell*, 595 S.W.2d 261, 265 (Mo. 1980). Walmar was free to seek judicial review of the decision of the P&Z Commission under § 536.140 R.S.Mo. (App. 37). Because Walmar had an adequate alternative remedy, the Missouri Court of Appeals lacked jurisdiction to hear Walmar's Petition.

Further, the Missouri Court of Appeals lacked jurisdiction because Walmar did not exhaust its administrative remedies before seeking judicial review. *State ex rel. Maynes Constr. Co., Inc. v. City of Wildwood*, 965 S.W.2d 949, 952 (Mo.Ct.App. 1998). Pursuant to § 89.380 R.S.Mo., Walmar could have sought review of the P&Z Commission's decision through the City's Board of Aldermen. (App. 35-36). Walmar also could have appealed to the Board of Adjustments or sought a variance. (App. 36). Because Walmar failed to exhaust available remedies, the Missouri Court of Appeals lacked jurisdiction to hear its appeal.

Further, the trial court correctly held that Walmar's petition for writ of mandamus was time barred because it was filed after expiration of the thirty-day time limit for review of administrative decisions. (*Id.*); § 536.110.1 R.S.Mo. The time limit for filing the petition for review is jurisdictional. *See Community Fed. Sav. & Loan Ass'n v. Director of Revenue*, 752 S.W.2d 794, 799 (Mo. banc 1988). The trial court also correctly denied the writ of mandamus because the P&Z Commission's conditional approval of the site plan had expired and, as a result, the issue before the

trial court had become essentially moot. (App. 37). A writ of mandamus will not issue where, if granted, it will be unavailing. *State ex rel. Childress v. Anderson*, 865 S.W.2d 384, 387 (Mo.Ct.App. 1993). For the reasons stated above, this Court does not have jurisdiction over petitioner's claims and further review should be denied.

STATEMENT OF THE CASE

Respondents are the City of O'Fallon, Missouri (hereinafter "O'Fallon" or "the City") and members of the P&Z Commission for the City of O'Fallon. (App. 19). O'Fallon is one of the fastest growing cities in the State of Missouri. (*Id.*). Only two major thoroughfares run north and south to Highway 70 through O'Fallon. (App. 19). The main and central thoroughfare is Highway K. (*Id.*). The level of traffic on Highway K has increased significantly in the past few years, and it is expected that the level of traffic will continue to increase as development in the City continues. (App. 19-20).

Pursuant to Chapter 89, R.S.Mo., the City has adopted ordinances regulating improvements and land development in the City of O'Fallon. (App. 20). The general purpose of these ordinances is to regulate and control land development so as to promote public safety, health and the general welfare of the community. (*Id.*). The City also adopted a Comprehensive Plan to promote these same purposes and to protect the interests of the public. (*Id.*). Pursuant to the City ordinances, the P&Z Commission is empowered to review site plans for proposed developments within the City. (*Id.*).

Walmar is one of a number of developers that in the past few years has applied to the P&Z Commission for approval to develop commercial sites between Highway K and Weldon Spring Road. (App. 21). In June 1997, Walmar submitted its first site development plan. (*Id.*). The proposed plan showed detailed development for about five acres of the tract, with the remaining acres marked for future development. (App. 22). The site development plan also showed a thirty foot wide paved road running through the Walmar Property from Highway K to Weldon Spring Road. (*Id.*).

The P&Z Commission staff reviewed the proposed site development plan and commented that (1) the City will need a right-of-way dedication along Weldon Spring Road; (2) City ordinances require all commercial drives in the City of O'Fallon be thirty-six feet wide and be built to collector road standards;[1] and (3) the site is not in conformance with the Comprehensive Plan. (*Id.*). Thus, the P&Z Commission advised Walmar in July, 1997 that its site plan did not comply with the City's ordinances requiring commercial drives to be thirty-six feet wide and built to collector street standards. (*Id.*).

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[1] Section 405.030 of the City ordinances defines "collector streets" as streets that "gather traffic from local streets and carry it to arterial streets where such traffic can then proceed to its destination." Section 405.030 further states that collector streets should be planned in such a manner to clearly provide a "collector" service for a neighborhood and development unit, but inhibit through traffic movement between neighborhoods or adjacent development units. Minimum rights-of-way for collector streets are sixty feet and minimum pavement width is thirty-six feet. § 405.370. Although Walmar's proposed road met the definition of a collector street, it did not meet collector street standards.

In July of 1997, Walmar asked the City's planning department to put its request for approval of its site development plan on hold, as it was having difficulty obtaining access to a sanitary sewer. (*Id.*). No further action was taken until June 1999, when Walmar submitted a revised site development plan to the P&Z Commission for the Walmar property. (*Id.*). The revised June of 1999 Plan also showed a thirty foot wide paved street running from Highway K through the Walmar Property to Weldon Spring Road. (*Id.*). The June of 1999 Plan was for a commercial shopping mall, including a proposed restaurant and it included proposed entrances on Highway K and Weldon Spring Road. (App. 23).

The P&Z Commission staff prepared an initial report, dated June 22, 1999, requesting that: (1) the plan be revised to align the access from Highway K with the existing Crusher Drive on the west side of Highway K; and (2) Walmar contact the City's traffic consultant, Crawford, Bunte & Brammaier ("CBB"), to provide a traffic study that would examine the site in conjunction with the proposed Taylor-Morley development to the north and review access points, cross access, and a collector roadway running through the site. (App. 25).

A revised site plan was submitted by Walmar on June 30, 1999, which continued to depict a thirty foot wide street running from Highway K through the proposed development. (*Id.*). In the meantime, the staff prepared a subsequent report dated July 8, 1999, recommending approval of the June 30, 1999 Plan conditioned on eleven separate comments, including requests for Walmar: (1) to provide a right-of-way dedication for a total of thirty feet from center line along Weldon Spring Road; (2) move the northern access point on Highway K to align it with the

existing Crusher Drive on the west side of Highway K where a traffic signal was planned; (3) provide a traffic analysis via the City's traffic consultant CBB that, at a minimum, reviews Highway K access, cross access and a collector roadway running through the site from Highway K to Weldon Spring Road; and (4) to allow cross access. (App. 25-26).

During the same time frame when Walmar was submitting its revised development plan in June 1999, other site development plans were being submitted for properties along south Highway K near the Walmar Property. (App. 23). As a result of these proposed developments, the City employed CBB to perform traffic studies related to specific site developments. (App. 24). Based on its studies, CBB recommended that three traffic signals be placed on Highway K in this area: (1) one signal at the intersection of Highway K and Weldon Spring Road near the Quik Trip; (2) one signal at the corner of Crusher Road and Highway K which could facilitate access to both the Mobil Mart and the Walmar site; and (3) a traffic light at the entrance to the Taylor-Morley site. (*Id.*). CBB also recommended that Crusher Road be extended from Weldon Spring Road on the west through to Highway K and from Highway K through the Walmar Property to Weldon Spring Road on the east as a collector loop. (App. 25). Based on these findings, the City amended its Comprehensive Plan to reflect such an extension of Crusher Road through the Walmar Property. (*Id.*).

Based on the traffic studies, CBB determined that the Walmar development will generate traffic at the level of approximately 2,500 vehicles per day. (*Id.*). To date, Walmar has offered no evidence controverting this finding. This traffic increase is in addition to the substantial traffic

flow that currently exists on south Highway K and the expected increase in that traffic flow as other developments along the highway are completed. (App. 24-25).[2]

Walmar submitted a final revised site development plan to the P&Z Commission on September 15, 1999. (App. 26). The revised plan did align the entrance of the proposed road running though the site from Highway K to Weldon Spring Road with Crusher Drive. (*Id.*). However, the width of the street was reduced from the previously proposed thirty feet to twenty-seven feet, even though Walmar was aware that O'Fallon ordinances required the street to be thirty-six feet wide. (*Id.*). The P&Z Commission staff prepared a report recommending approval subject to certain conditions, including: (1) Walmar agreeing to provide a right-of-way dedication along Weldon Spring Road when the area fronting that road is developed;[3] (2) Walmar agreeing to allow cross access between its property and the property to the north and south (when it is developed) and to enter into necessary agreements

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[2] Walmar erroneously contends that the P&Z Commission's decision was based solely on the CBB traffic study relating to the Walmar Property. To the contrary, the traffic study to which Walmar alludes was only part of the information before the P&Z Commission and upon which it based its decision. The P&Z staff had employed CBB beginning in the spring of 1999 to do traffic analyses and studies of the City's traffic patterns and streets, including Highway K and areas surrounding the Walmar Property. (Trial Transcript, 329). Information from these studies was available to the P&Z Commission. The Commissioners also live in and around the subject area and witness first hand the pattern and level of traffic in the area. (Trial Transcript, 430, 442-43).

[3] Walmar had already dedicated to Duckett Creek Sanitary District an easement that could not be built upon along this portion of the Walmar Property fronting Weldon Spring Road. (App. 32).

concerning such access with the developers of those properties; and (3) Walmar providing for a thirty-six foot wide public collector road within a sixty foot right-of-way from Highway K to Weldon Spring Road. (App. 26-27).

Walmar's representatives appeared at the P&Z Commission hearing on September 28, 1999 to present their case for approval of the September 15, 1999 Plan. (App. 27). Walmar representatives told the Commission that Walmar would not accept the conditions relating to cross access, the future and contingent right-of-way along Weldon Spring Road and the width of the collector street going through the Walmar Property. (*Id.*). At the September 28, 1999 hearing, the P&Z Commission voted to approve the September 15, 1999 Plan with the conditions recommended by P&Z Commission staff. (*Id.*). A certificate of conditional approval was then issued for the Walmar site development plan. (*Id.*).

Walmar refused to accept the conditions to approval and, instead, filed a Petition for Writ of Mandamus. Walmar filed its Petition rather than applying to the City's Board of Adjustment for a variance. (App. 36). Walmar also chose not to appeal the P&Z Commission's decision to the City Board of Adjustments or the Board of Aldermen. (*Id.*). On May 18, 2001, the Circuit Court of St. Charles County, Missouri, denied Walmar's petition for writ of mandamus. (App. 38). Walmar appealed this decision, and the Missouri Court of Appeals, Eastern District, issued its Order denying a writ of mandamus to petitioner on August 20, 2002. (App. 1).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE TESTS ENUNCIATED BY THIS COURT IN *DOLAN V. CITY OF TIGARD* AND *NOLLAN V. CALIFORNIA COASTAL COMMISSION.*

Granting the petition for certiorari requested by Walmar is unnecessary as the Missouri Court of Appeals explicitly analyzed the takings question at issue under the tests articulated by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (App. 6-7). In examining the requirements imposed by the P&Z Commission, the Court of Appeals explained:

> First, it must be determined whether there is an "essential nexus" between a legitimate state interest and the condition required by the City. *Nollan*, 483 U.S. at 387. If the required conditions are unrelated to the stated purpose, there is no "essential nexus" and the conditional requirement would constitute a taking. Second, assuming there is an essential nexus, it must be analyzed to determine the degree of connection between the required dedication and the projected impact of the proposed development. *Dolan*, 512 U.S. at 391. Under *Dolan*, there must be "rough proportionality" between the two.

(App. 6). Any suggestion that the Court of Appeals did not apply the *Nollan* and *Dolan* standards is belied by the explicit language of the Court of Appeals' Order.[4]

Petitioner's argument to the contrary relies purely on semantics. After enunciating and applying the standards provided in *Nollan* and *Dolan*, the Missouri Court of Appeals compared the rough proportionality test announced in these cases with the reasonable relationship test adopted in Missouri in 1972, before the Supreme Court's rulings in *Nollan* and *Dolan*. *See State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363, 367 (Mo. 1972). The Missouri Court of Appeals then reviewed the relevant case law and law review articles discussing the two tests and determined that the reasonable relationship test and the rough proportionality test were the same test. (App. 7) (finding "[b]oth tests result in the same conclusion"). The Court of Appeals then decided, as a matter of semantics alone, to call the test the "reasonable relationship" test throughout the rest of the opinion. (App. 7). Because the Court of Appeals applied the correct test for reviewing the conditions at issue, respondents respectfully submit that the petition should not be granted.

Further, and as shown by the Court of Appeals' analysis, the three approval conditions at issue clearly satisfy the "rough proportionality" test. The first condition

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[4] Because the Missouri Court of Appeals' decision is in accord with this Court's jurisprudence, it is likewise in accord with the cases decided by the United States Court of Appeals for the Eighth Circuit. For the sake of brevity, respondent will not separately address this portion of petitioner's argument.

required that Walmar construct a public collector road.[5] At the trial, O'Fallon presented the uncontroverted testimony of Craig Holan of CBB, who testified that the Walmar development would experience traffic at the rate of approximately 2,500 vehicles per day. (App. 9, 13). Mr. Holan's testimony was based on a traffic study commissioned by the City of O'Fallon to determine the effect of the proposed development on local traffic and roadways. (App. 9). Mr. Holan testified that the collector road requirement was directly related to Walmar's proposed development. (*Id.*). Thomas Ashburn, director of development services for O'Fallon, testified that the collector road would assure that the traffic movement within and in relation to the Walmar development would be safe and convenient. (*Id.*).

After reviewing this testimony and evidence, the Court of Appeals determined:

> The evidence in the case at bar demonstrated that a public collector road through Kingsmill will alleviate the burden Walmar's development will contribute to the traffic in the area. . . . By building the street to collector street standards, O'Fallon can ensure that the public has a safe and convenient means of traversing the Walmar property. Further, O'Fallon will be able to control access to the road, provide police protection, snow removal and other required maintenance to

[5] As discussed earlier, Walmar's own development plan required that a similar street be built in the Walmar development; however, Walmar's proposed street did not comply with O'Fallon's ordinances. (App. 8).

> a street that will be heavily traveled by residents and visitors to Kingsmill.

(*Id.*). The Court in *Dolan* specifically recognized that "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." 512 U.S. at 395. The Missouri Court of Appeals properly determined that an essential nexus existed between the required collector road and the Walmar development and further determined that the requirement of the collector road was roughly proportional to the increased traffic to be caused by the Walmar development. (App. 9).

The Court of Appeals conducted the same *Dolan* and *Nollan* analysis for the condition requiring cross access to properties adjacent to the Walmar development. Mr. Holan testified that Highway K, O'Fallon's main thoroughfare, is already a heavily traveled road. (App. 9). Mr. Holan testified that the cross access will alleviate traffic from going on and off Highway K and further disrupting traffic on this busy roadway, by allowing vehicles to travel from one development to another without going onto this major road. (App. 9, 10). Mr. Ashburn further testified that the cross-access would provide the same function in lessening the traffic entering and exiting Weldon Spring Road, another busy O'Fallon street. (App. 10). The evidence in this case establishes that cross access will offset some of this traffic demand. The cross access requirement has an essential nexus to the Walmar development and this requirement is roughly proportional to the traffic increase that will be caused by Walmar. (App. 10).

The third condition requires Walmar to provide a right-of-way for widening Weldon Spring Road, if Walmar

chooses to develop property along that road. (*Id.*). Walmar's planned development showed a major entrance with a large sign from Weldon Spring Road directing traffic into the Walmar site. (App. 31). As the Court of Appeals determined: "The record demonstrates that when Walmar develops the property fronting Weldon Spring Road, traffic will increase. Dedication of a right-of-way to widen Weldon Spring Road will help accommodate this additional traffic." (App. 10). The Court of Appeals thus affirmed the trial court's determination that this condition "directly and reasonably relates to the proposed site development and the burdens that it will create." (App. 31).

Not only are the conditions roughly proportional to the impact of the Walmar development, but the conditions will not have a devastating impact on the property as Walmar claims. The trial court held that the conditions will actually benefit Walmar in the following ways:

> . . . enhanced value to its property by O'Fallon's widening and improving Highway K and Weldon Spring Road, by O'Fallon's development policies resulting in substantial residential and commercial growth in the area, by providing a $200,000 traffic light for access to the Walmar site at no cost to Walmar and by assuming the maintenance and upkeep of the street running through the Walmar site.

(App. 29). Walmar, however, misleadingly claims that the sixty foot right-of-way and setback requirements will cost it $1.4 million. (Petition 4). This is not true, as Walmar

has significantly distorted the cost difference between what it proposed and what the City ordinances require.[6] Walmar further complains that the "City's conditions would obliterate the retail development and future development of the entire 18.5 acre parcel." (Petition 4). However, it was Walmar, not the City of O'Fallon, that determined the position of the collector road. (App. 30). Additionally, Walmar has greatly exaggerated the difference between the amount of land that will be utilized for a collector street as opposed to a minor street. Even if Walmar was allowed to construct a thirty foot "minor street," a fifty foot right-of-way would be required. *See* City Ordinances, § 405.030.

Likewise, the right-of-way dedication along Weldon Spring Road will have only a slight impact upon the Walmar Property. Walmar has already dedicated an easement to the Duckett Creek Sanitary Sewer District along Weldon Spring Road upon which Walmar cannot build. (App. 32). Moreover, § 405.210.B of the City ordinances empowers the City to require a developer to pay for bringing the road abutting the developer's property up to

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[6] Using Walmar's own figures and math, the difference between the thirty foot street proposed by Walmar and a thirty-six foot collector street is approximately $70,000. (Walmar contends that the length of the proposed street is 1184.7 feet. Factoring the number by the extra 6 feet equals 7,108 square feet, and multiplying this by the $10 per square foot used by Walmar as the value of the Walmar Property equals $71,082). The difference between the value of a fifty foot right-of-way for a minor street (which is what Walmar claims the street should be defined as under the City ordinances), as opposed to a sixty foot right-of-way for a collector street, is approximately $118,000. (1184.7 x 10 foot = 11,847 square feet x $10 per square foot = $118,740). These amounts are a far cry from the $1.4 million figure claimed by Walmar.

the required standards. (App. 32). Here, Walmar was merely being asked to dedicate a right-of-way for the widening of the road if and when it proceeded with the additional development of the site. Because the conditions at issue satisfy the requirements set forth in the *Dolan* and *Nollan* opinions, respondents respectfully submit that the petition should not be granted.

II. THE MISSOURI COURT OF APPEALS PLACED THE BURDEN OF PROOF ON THE CORRECT PARTY IN DETERMINING THAT THE RESTRICTIONS PLACED ON THE WALMAR DEVELOPMENT WERE ROUGHLY PROPORTIONAL TO THE IMPACT OF THE PROPOSED DEVELOPMENT.

A. The Court of Appeals Clearly Required the City of O'Fallon to Bear the Burden of Proof.

Contrary to petitioner's assertions, the Missouri Court of Appeals did require the City of O'Fallon to bear the burden of showing that the conditions placed on the Walmar development were roughly proportional to the impact of the development. The Court of Appeals specifically held that Walmar "did not demonstrate *any failure by O'Fallon to satisfy* the reasonable relationship test in requiring the conditions for the approval of the site plan." (App. 8) (emphasis added). The language of the Court of Appeals' opinion clearly demonstrates that the City of O'Fallon, and not Walmar, was required to bear the burden of proof on issues relating to proportionality.

The Court then engaged in a lengthy discussion showing how the City of O'Fallon had met its burden of proof regarding each of the three disputed requirements.

Regarding the requirement that a road through the Walmar development be built to collector road standards, the Court of Appeals, after discussing the factual record developed at the trial court, found that the City of O'Fallon met the test "as to this condition." (App. 9). In discussing the cross access easement, the Court of Appeals noted O'Fallon had presented evidence and proved that the cross access "will alleviate traffic from going on and off Highway K and disrupting the flow of traffic." (App. 9-10). The Court again reiterated that O'Fallon had met its burden of proof regarding this condition. (App. 10). Regarding the right-of-way along Weldon Spring Road, the Court of Appeals discussed the evidence propounded by the City of O'Fallon regarding the necessity of such a right-of-way and found that O'Fallon had met its burden. (App. 9). Any suggestion that Walmar was somehow required to bear the burden of proof is simply unsupported by the record at trial, the evidence presented, the trial court's judgment, and the Court of Appeals' decision.

B. The Court of Appeals Placed the Burden of Proof on the City of O'Fallon, Even Though the Mandamus Remedy Sought by Walmar Required Walmar to First Prove by Clear and Unequivocal Evidence Its Right to the Relief Sought.

The Court of Appeals clearly placed the burden of proof on the City of O'Fallon. However, even assuming for the sake of argument that Walmar was required to bear the burden of proof, such a decision would have been proper, given that Walmar sought relief from the P&Z Commission's decision through a writ of mandamus. Regardless of its allegations of an unconstitutional taking,

Walmar was legally required under Missouri law to prove first by clear and unequivocal evidence its right to the relief sought.

The Missouri courts have long held that mandamus is an extraordinary remedy and should be issued only in exceptional circumstances. As the Missouri Supreme Court stated in *Kelley*, 595 S.W.2d at 265, mandamus "is essentially the exponent of judicial power and, hence is reserved for extraordinary emergencies." Additionally, mandamus will only issue to compel the performance of a ministerial duty, not a discretionary one. *State ex rel. Kessler v. Shay*, 820 S.W.2d 311, 314 (Mo.Ct.App. 1991). The ministerial duty sought to be coerced must be "simple and definite, arising under conditions admitted or proved and imposed by law." *Kelley*, 595 S.W.2d at 265. Mandamus cannot issue where the right is doubtful, or where there is another adequate remedy. *Id.*

The burden of proof in a mandamus action is placed squarely upon the relator. It must prove unequivocally that the respondent failed to perform a ministerial duty imposed by law. *State ex rel. Lupo v. City of Wentzville*, 886 S.W.2d 727, 731 (Mo.Ct.App. 1994). In other words, as the Court held in *State ex rel. J.S. Alberici v. City of Fenton*, 576 S.W.2d 574, 579 (Mo.Ct.App. 1979), the party seeking the writ must demonstrate a "clear, unequivocal, specific right to have performed the thing demanded and that the defendant or respondent has a corresponding duty to perform the action sought." Even though the Court of Appeals did not place the burden of proof on Walmar, requiring Walmar to prove that it was entitled to the mandamus relief sought would have been appropriate

under Missouri law. Accordingly, petitioner's claim warrants no further review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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